QUAH ENG HOCK

v.

ANG HOOI KIAM

HIGH COURT MALAYA, JOHOR BAHRU
SULONG MATJERAIE JC
[ORIGINATING SUMMONS NO: 24-531-1997]
29 SEPTEMBER 1999

TRUSTS: *Resulting trust - Presumption of advancement - Whether rebuttable - Property registered under two names - Plaintiff allegedly paid full purchase price of property - Plaintiff claimed defendant was to hold half share on trust for plaintiff - Defendant absent and unrepresented - Whether declaration of trust must be in writing - Whether plaintiff's allegations amount to bare assertions only - Whether common intention that half share be held on trust proved*

The plaintiff purchased a house for RM170,000, of which half title share and interest was in his name and the other half title share and interest was in the name of the defendant. This was accordingly reflected in the issued document title.

The plaintiff alleged that he was the beneficial owner of the land as he had paid all monies due including cost, legal cost and even settled the bank loan of RM70,000 taken to finance the said purchase. No evidence, however, was adduced to show who paid the difference between the purchase price and the loan amount. The plaintiff contended that the defendant's failure to give any consideration in respect of her half title share rendered her a trustee in respect of that half share.

The plaintiff admitted in evidence that although the defendant was his mistress, it was not his intention to give the half share to the defendant as a gift. On the contrary, the plaintiff stated that he had on numerous occasions requested the defendant to transfer the said half share back to him but the defendant failed to do so. The plaintiff stated that he included the defendant's name in the title deed at her request in order to ensure that the defendant remained as his mistress.

Subsequently, the defendant went missing and all efforts to locate her in order to enable the transfer of her half share back to the plaintiff was to no avail. Hence, the plaintiff applied for a declaration that the defendant is a trustee for the plaintiff in respect of the half title share and interest in the said land which is currently registered in the name of the defendant.

In support of his application, the plaintiff relied on the doctrine of presumption of advancement, that is, where property is vested in a purchaser jointly with others or in another or other persons alone, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase price. The plaintiff further contended that a declaration of a trust need not be in writing and may be made informally, as in this case, provided the words are clear and unequivocal.

Held:

[1] The doctrine of presumption of advancement is a rebuttable presumption and can be rebutted if the defendant can show that from the circumstances prevailing before and at the time of the acquisition and transfer of the said land, there was between the defendant and the plaintiff a common intention that it was to be otherwise. In determining whether or not there was a common intention between the parties, regard can be had to the conduct of the parties.

[2] Words creating a trust need not be in writing but must be clear and unequivocal. Any words that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are sufficient for the purpose of creating a trust.

[3] Since the defendant was neither present nor represented by counsel, there was no one to argue her case and to confirm or deny the assertions and allegations of the plaintiff. The plaintiff only made a bare assertion that he had paid for the purchase of the property. It is possible that the defendant may have paid for it. As the amount involved was substantial, this was an important aspect of the case.

[4] There was no clear and unchallenged evidence to suggest the common intention of both parties that the defendant be made a trustee. The reasons put forward by the plaintiff for including the defendant's name in the title deed seem to contradict his assertion that he never intended to give the half share in the said land to the defendant.

[5] In the absence of any of the vitiating factors laid down in s. 340 of the National Land Code 1965, a title once registered is indefeasible. It is the registration and not its antecedents which vests and divests title. The concept of indefeasibility of title cannot simply be dislodged by a bare assertion of trust, the creation of which has not been proven to be clear, unequivocal and irrevocable.

[Application dismissed.]

Case(s) referred to:
Alan Frederick Frazer v. Douglas Hamilton Walker [1967] 1 AC 569 ***(refd)***
Benard v. Josephs [1982] 1 Ch D 391 ***(refd)***
Chua Cheow Tien v. Chua Geok Eng & Anor [1968] 2 MLJ 180 ***(refd)***
Cooke v. Head [1972] 1 WLR 518 ***(refd)***
Gissing v. Gissing [1971] AC 886 ***(refd)***
Grant v. Grant 33 ER 776 ***(refd)***
Neo Tai v. Foo Stie Wah [1982] 1 MLJ 170 ***(refd)***
Tee Bee v. K Maruthamuthu [1977] 2 MLJ 7 ***(refd)***
Toon Boon Lee v. Yeo Ah Beng [1986] 2 MLJ 276 ***(refd)***
Sabrina Loo Cheng Suan v. Engene Khoo Oon Jin [1995] 1 CLJ 875 ***(refd)***
Wan Naimah v. Wan Mohamad Nawawai [1974] 1 MLJ 41 ***(refd)***

Legislation referred to:
National Land Code 1965, s. 340(4)(a), (b)
Rules of the High Court 1980, O. 32 r. 11(1)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol. 48 para. 597

For the plaintiff - Hua Kia Fook; M/s KF Hua & Partners

Reported by Anushana Balasubramaniam

JUDGMENT

Sulong Matjeraie JC:

This is an application by way of an originating summon praying for a declaration that the plaintiff Quah Eng Hock, a Singaporean, of 170, Upper Bukit Timah Road, 05-18, Bukit Shopping Centre, Singapore 2158, is the beneficial owner of ½ title share in one parcel of land under PTD 17349 HS(D) 27240 Mukim Plentong (hereinafter referred to "the said land") currently registered in the name of the defendant, as a trustee to the plaintiff; alternatively a declaration be made that the defendant is a trustee for the plaintiff in respect of ½ title share and interest in the said land currently registered in the name of the defendant.

This application is supported by an affidavit affirmed by the plaintiff, Quah Eng Hock on 4 June 1997 which *inter alia* states that:

1. The plaintiff bought a house constructed on the said land on 1 March 1988 under his own name ½ title share and interest and the other ½ title share and interest was in the name of the defendant and this was accordingly reflected in the issue document of title.

2. The plaintiff alleged that he is the beneficial owner of the said land and further alleged that he has paid all the money for the purchase of the said land including costs and legal cost as well as the monthly instalment since 1988 until full payment of loan from Ban Hin Lee Bank.

3. The plaintiff alleged that in law the defendant is a trustee in respect of the ½ share in the said land as the defendant did not give any consideration in respect of the ½ title share and that the plaintiff never had any intention to give ½ title share to the defendant as gift.

4. Plaintiff has on numerous occasions requested the defendant to transfer back to the plaintiff the ½ share in the said land but the defendant was alleged to have failed or refused to do so.

As this matter involves the hearing of oral evidence of the plaintiff, pursuant to O. 32 r. 11(1) Rules of High Court 1980 this case was moved into open court.

In his oral evidence, the plaintiff advanced the following arguments to support his claim.

The house located at No. 3, Serene Park, Johor Bahru, PTD 17349 HS(D) 27240 Mukim Plentong and also known as No. 3, Serene Park, Johor Bahru was purchased for RM170,000 in March, 1988. The plaintiff claimed that he paid for the purchase price and legal costs.

A bank loan was obtained from Ban Hin Lee Bank for a sum of RM70,000 to help finance the purchase of the said land. Monthly instalments were paid by the plaintiff only.

The registered owners of the said land were and still are Mr. Quah Eng Hock, the plaintiff (½ share) and the remaining half share is registered under the name of Ang Hooi Kiam, the defendant.

The plaintiff in his evidence said he had never intended to give ½ share of the title in respect of the said land as a gift to the defendant but purely to make her as a trustee.

Evidence was also given to this court that the plaintiff came to know the defendant initially at a nightclub known as Hollywood Night Club at Taman Sentosa, Johor Bahru where she then worked as a waitress. The plaintiff started to woo the defendant by drinking liquor together and he "wanted her to be his lover". She became his lover for about half a year from late 1987 to middle of 1988 and the plaintiff admitted to this court that the defendant was his mistress.

The plaintiff told this court that the defendant requested that her name be included in the title deed. The plaintiff obliged as he wanted to keep the defendant as his mistress and such inclusion would show he has the means to maintain and upkeep the defendant. Further by so doing, the plaintiff claimed that his wife and children will not know that he has a mistress in Johor Bahru in that he can tell his wife that the defendant has ½ share in the said land!

The plaintiff told the court in his evidence that the reason why he purchased the said land was for his future as he has a lot of children.

He has settled the bank loan in June, 1996 and hitherto the document of title in respect of the said land is in his custody.

The plaintiff also told this court that by middle of 1988 the defendant went missing and he asked a friend to look for her in order that he can transfer back to himself the ½ share and interest in the said land. Up till now he and his friend have failed to trace the whereabout of the defendant.

The defendant was never served personally with the originating summons. Advertisements by way of substituted service in respect of the notice of proceeding – were made in Sin Chew Jit Poh on 28 May 1998, 9 October 1998 and 13 January 1999, but the address of the defendant used then was at 10-C, Clove Hall Road, 10050 Pulau Pinang. As will be seen below the defendant was never at this address on the dates of the publication.

Learned counsel Mr. KF Hua ably submitted that where a real or personal property is vested in a purchaser jointly with others or in another or other persons alone, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money. The learned counsel quoted the case of *Chua Cheow Tien v. Chua Geok Eng & Anor* [1968] 2 MLJ 180 High Court Singapore decision where the learned Chua J said at p. 185 "The settled law is that if A buys property in the name of B, who is no relative, B is held to be trustee of the property for A but if B is a child or a wife of A no such trust is presumed and the law presumes that the legal and beneficial ownership is in the child or the wife so that the onus is on those who seek to rebut the presumption and establish an absolute trust for the father." This case which is on the presumption of advancement was referred to in the Malaysian case of *Sabrina Loo Cheng Suan v. Engene Khoo Oon Jin* [1995] 1 CLJ 875.

Learned counsel for the plaintiff submitted further that declaration of trust need not be in writing and may be made informally, provided words are clear and unequivocal, see Federal Court decision in *Wan Naimah v. Wan Mohamad Nawawai* [1974] 1 MLJ 41 and *Grant v. Grant* 33 ER 776.

The general principles governing such trust have been well expounded in numerous English cases.

The learned counsel also submitted to this court the decision of the Singapore's Court of Appeal in the case of *Neo Tai Kim v. Foo Stie Wah* [1982] 1 MLJ 170 and their High Court's decision in *Toon Boon Lee v. Yeo Ah Beng* [1986] 2 MLJ 276.

The issue as suggested by the learned counsel was whether at the time of the purchase, there was a resulting trust in favour of the plaintiff, who, as alleged by the counsel have paid all the repayment.

Turning to the National Land Code, it was the contention of the learned counsel that this court has the power to grant the declaration under s. 340(4)(a) and (b). Further, part thirty-one of the National Land Code provides for the jurisdiction of the court under the National Land Code and in particular s. 417 thereof.

His Lordship Justice Vincent Ng has said that the plaintiff need only prove, by adducing facts or circumstances, on the balance of probabilities that the property was held in trust in his favour, see *Sabrina Loo Cheng Suan v. Eugene Khoo Oon Jin (supra)* at p. 884, para. (f).

The Law

The court is in substantial agreement with the learned counsel on his submission on the law in respect of resulting trust.

The doctrine of presumption of advancement is however a rebuttable presumption and can be rebutted if the defendant can show the acts and circumstances prevailing before and at the time of the acquisition and transfer of the said land, that there was between the defendant and the plaintiff a common intention that it was to be otherwise.

In respect of words declaring trust, Romilly, MR in *Grant v. Grant (supra)* said, (words) "need not be in writing ... . They must be clear, unequivocal and irrevocable, but it is not necessary to use any technical words, it is not necessary to say " I hold the property in trust for you," nor is it necessary to say: "I hold the same for your separate use." Any words that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that it is also sufficient for the purpose of showing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created."(p. 777).

This has been accepted as a principle by the Federal Court of Malaysia in *Wan Naimah v. Wan Mohamad Nawawai (supra)*.

On resulting trust, *Halsbury's Laws of England*, 4th edn, vol. 48 para. 597 says as follows:

> A resulting trust is a trust arising by operation of law:
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> (1) Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or in part; or
>
> (2) Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or
>
> (3) Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.
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> In all these cases, except where the failure of a declared trust arises from the illegality of the object, and the trustee relies on the maxim *in pari delicto potior est conditio possedentis*, the beneficial interest in the property, so far as not applicable to any sufficiently expressed or indicated beneficiary or object, results or reverts to the disposer or purchaser of the property or, in the case of his previous death, to his representatives.

The facts of this case do not unfortunately appear to be as straight forward as suggested by the learned counsel for the plaintiff. While the authorities produced tend to show both parties were present at the trial, in this instant case the defendant could not be located or traced. Attempts were made to serve the necessary papers on her but all failed.

As the actual address of the defendant could not be established a search was made at the National Registration Department Malaysia (Identity Card Division) to get her latest address. A reply from National Registration Department came through their letter dated 27 October 1998 (encl. 14) that the address of the defendant as at 4 March 1994 was at 1B-10-2, Taman Kilangin, Jalan Sungai, 10150 Georgetown, Pulau Pinang. The defendant's identity card has yet to be replaced and still bears the old number. She has not notified the authority of any change of address. There is nothing in their record to suggest the defendant has passed away either.

Attempts were also made by Encik Dzulkifli bin Haji Ahmad, a process server attached to High Court, Penang to serve a notice of appointment to hear

originating summons onto the defendant at the address provided by the National Registration Department. In his affidavit filed in this court (encl. 17) it was stated therein that he attempted service on 9 and 17 December 1998 at the house lB-l0-2 Taman Kilangin, Jalan Sungai, 10150 Georgetown, Penang and found that the door was closed and locked and upon further check he discovered that the said house has been sold to another individual (duly named in the affidavit). This is an important factor here as whereas in other cases as well as the authorities quoted both parties were not only present but represented by counsel as well. In this case the defendant was neither represented nor present. As such there was no one to argue her case and to confirm or deny the assertions and allegations made by the plaintiff.

As the defendant could not be reached, numerous questions have remained unanswered. However the onus is on the plaintiff to show that the defendant was his trustee and has no beneficial interest on the said land.

What is the right of a mistress in a situation like this instant case? Why was the said land registered in two names; that of the plaintiff and defendant as co-owners? Why was it not in the name of the defendant alone for instance?

Lord Denning MR in the Court of Appeal case of *Benard v. Josephs* [1982] 1 Ch D 391 at 399 said that the rights of a mistress is the same as that of a wife, to engaged couples and maybe to other relationship too. He quoted a case decided earlier in *Cooke v. Head* [1972] 1 WLR 518. Would the defendant who, as admitted by the applicant was, his mistress be entitled to half of the said land?

This court must ascertain, from all the evidence brought before it, whether the parties in fact reached an agreement or had a common intention. It is the duty of this court to declare the existing right of the parties. In the absence of evidence to the contrary, the beneficial interest follows the legal title.

In determining whether or not there was such a common intention regard can be had to the conduct of the parties. To establish this intention, there must be some evidence which points to its existence. Viscount Dilhorne in *Gissing v. Gissing* [1971] AC 886 at p. 900 said:

> I agree with my noble and learned friend Lord Diplock that a claim to a beneficial interest in land made by a person in whom the legal estate is not vested and whether made by a stranger, a spouse or a former spouse must depend for its success on establishing that it is held on a trust to give effect to the beneficial interest of the claimant as a *cestui que* trust.

While evidence was led and produced to court on the payment of the loan through monthly instalments allegedly made by the applicant to Ban Hin Lee Bank, no evidence was brought before this court as to who paid for the difference between the purchase price and the loan amount.

The total cost of the said land (including the house) was RM170,000 see exh. QEH-2 of encl. 2. The bank loan was RM70,000. Who paid the amount of RM100,000? How was the said amount paid? As the amount is substantial it becomes an important aspect of this case.

The plaintiff only made a bare assertion that he had paid for the purchase of the said land including costs and legal cost. It is possible that the defendant may have paid it? As no evidence was ever produced it remains unanswered.

It is worthy to note also that para. 6 of encl. (2) – Affidavit supporting the originating summons – alleged that on numerous occasions the plaintiff requested the defendant to come and transfer ½ share and interests in the said land to the plaintiff. The defendant failed and refused to do so. But in the witness box the plaintiff said through his friend, he searched for the defendant but was unsuccessful and he does not know where the defendant is now. The defendant appears to have "vanished" and is it accurate to say that he (the plaintiff) has requested the defendant to transfer, as alleged in his affidavit, when her whereabout is unknown?

Further it did not escape the attention of this court that while the plaintiff said he had never intended to give ½ share title and interest in the said land to the defendant, the plaintiff also wanted the defendant to be his lover and admitted to this court that the defendant was his mistress.

Evidence was also given in court that it was the defendant who requested the plaintiff to include her name in the land title. This was done as the plaintiff did not want his wife and children to know that he has a mistress at Johor Bahru. The plaintiff further admitted his second reason for including the defendant's name in the land title of the said land was to show to the defendant that he has the means to upkeep and maintain the defendant as a mistress.

All these seem to contradict the plaintiff's assertion that he has never intended to give ½ share in the said land but purely to make her as a trustee and that he purchased the said land for his future as he has a lot of children.

Regretfully all these are not persuasive at all though the standard of proof is only on the balance of probabilities. There is unfortunately no clear and unchallenged evidence to suggest the common intention of both parties that

the defendant be made a trustee to hold ½ share interest and title in the said land for the benefit of the plaintiff. The contrary however appears to be true.

Another argument advanced by the learned counsel for the plaintiff was the power conferred by s. 340(4)(a) and (b) of the National Land Code 1965 (NLC) and the general authority of the court under s. 417 thereof.

However, it must be pointed here that in the absence of any of the vitiating factors laid down in s. 340 NLC, a title once registered is indefeasible, see *Tee Bee v. K Maruthamuthu* [1977] 2 MLJ 7, Federal Court. It is in fact the registration and not its antecedents which vests and divests title, per Lord Wilberforce in *Alan Frederick Frazer v. Douglas Hamilton Walker* [1967] 1 AC 569 quoted by Ali Ag CJ (Malaya) (as his Lordship was then) in *Tee Bee v. K Maruthamuthu (supra)*. It is the view of this court that the concept of indefeasibility of title cannot simply be dislodged by a mere bare assertion of trust, the creation of which has not been proven to be clear, unequivocal and irrevocable. It is simply not safe to do so.

The rights of the parties must be judged on general principles applicable in any court of law when considering questions of title to property.

Unfortunately the conduct of the plaintiff in this application was quite insufficient to support his contention and prayers and this court is unable on the evidence before it to draw any fair and reasonable conclusion that there was any common intention that the defendant was a trustee holding ½ title share and interest in the said land for the benefit of the plaintiff.

In the circumstances, this court has no other alternative but to dismiss the application at encl. (3).